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IN THE

Supreme Court of the United States

October Term, 1980

NO._____

J.M. RUSSELL & EUGENE LEAKE,
Petitioners,
V.
STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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Come now the Petitioners, J.M. Russell and Eugene Leake, and petition the Supreme Court of the United States to issue the writ of certiorari to review a decision of the Supreme Court of the State of Tennessee, and in support thereof would show unto the Court as follows:

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners were denied a fair trial by way of prosecutiorial misconduct where prosecuting attorneys granted prosecution witnesses immunity from prosecution; and where prosecuting attorneys restored to prosecution witnesses confiscated money from the sale of illegal drugs; and where prosecuting attorneys failed to disclose said grant of immunity and restoration of confiscated money after a discovery motion under *Brady v. Maryland.*

2. Whether Petitioners were denied the right to remain silent where the Trial Court allowed Defendants to be cross-examined for impeachment at trial concerning their silence after being advised of their right to remain silent under *Miranda v. Arizona,* at the time when the search warrant was served.

3. Whether Petitioners were denied the right to submit witnesses in their own behalf where the Trial Court excluded under the hearsay rule testimony of words of invitation onto premises in a burglary case, and testimony of words of danger, threat, fear, and provocation in an assault case.

4. Whether Petitioners were denied the right to confrontation of witnesses where the Trial Court admitted into evidence at trial the hearsay contents of search warrant affidavit.

PARTIES

1. The Petitioners are J.M. Russell and Eugene Leake, residents of the State of Tennessee. They were the Defendants in the criminal prosecution that is the subject of this petition. Thereafter, they were Appellants in an intermediate and final resort appeal to the Tennessee Supreme Court.

2. The Respondent is the State of Tennessee, and was the Plaintiff in the prosecution which is the subject of this petition. The State of Tennessee was the Respondent in an intermediate and final resort appeal of the Tennessee Supreme Court.

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V.

OPINIONS SUBMITTED BELOW

There has been no formally published opinion by the Trial Court, intermediate Appellate Court, or Tennessee Supreme Court. The conduct in the indictment was returned by the Grand Jury of Shelby County, Tennessee on September 29, 1978.

The Petitioners were convicted of burglary and aggravated assault on March 3, 1979, without Bench Opinion, before the Criminal Court of Shelby County, Tennessee.

Thereafter, they perfected an intermediate appeal to the Tennessee Court of Criminal Appeals, which affirmed theri conviction on May 15, 1980. A copy of the opinion of Tennessee Court of Criminal Appeal is unpublished, and is made Appendix A.

Thereafter, the Petitioners applied for a discretionary appeal to the Tennessee Supeme Court, which was denied by order without explanation on August 4, 1980. A copy of the order of Tennessee Supreme Court is made Exhibit B to the Appendix.

VI.

JURISDICTION

Petitioners pray for the United States Supreme Court to review a decision of the Tennessee Court of Criminal Appeals entered on May 15, 1980; from which an application for discretionary appeal was taken by the Defendants to the Tennessee Supreme Court; and the Tennessee Supreme Court denied permission to appeal on August 4, 1980. The Tennessee Supreme is the Court of FINAL RESORT IN THE State of Tennessee.

Petitioners have not prayed for a rehearing to the Tennessee Supreme Court or for an extension of time to the United States Supreme Court. There is no cross-

petition for the writ certiorari.

The statutory basis for jurisdiction in this case is 28 U.S.C. 2101 (d), read in conjunction with Rule 20.0 of the Rules of the Supreme Court of the United States. This petition is filled within 60 days of the decision of the Tennessee Supreme Court.

VII.

CONSTITUTIONAL PROVISIONS

Petitioners would show that they have been denied substantive and procedural due process of law as required by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

The above-cited Constitutional Amendements are made Appendices C, D, E, and F to this petition.

VIII.

STATEMENTS OF THE CASE

This case originated as a criminal prosecution against the Petitioners, Defendants below, for the offenses of robbery with a deadly weapon, burglary in the first degree, and aggravated assault.

The State of Tennessee contended that Defendants, who were Memphis Police Officers, broke into the apartment of drug pushers, robbed them, and assaulted them. The defendants joined issue, and conteded that they were let into the premises by the lawful lessee; that one of the drug pushers pointed a pistol and another started a fight; that they responded in self defense; and they denied committing an armed robbery, a burglary, or an assault.

The conduct alleged in the indictment occurred on September 26, 1978. The indictments were were returned by the Grand Jury of Shelby County, Tennessee

on September 29, 1978.

On March 3, 1979 the jury returned a verdict of not guilty on the robbery charges, and guilty on the charges of burglary first degree and aggravated assault. Whereupon, the Defendants perfected an appeal as of right to the Tennessee Court of Criminal Appeals, which was denied on May 15, 1980. (App. A) Thereafter, they prayed for a discretionary appeal to the Tennessee Supreme Court, which was denied on August 4, 1980. (App. B)

Now, therefore, the Petitioners petition for the issuance of the writ of certiorari because the Trail Court, Intermediate Appellate Court, and Tennessee Supreme Court, have issued rulings on Federal Constitutional rights of the accused, under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States of America, which are in conflict with the Constitution of the decisions of the Untied States Supreme Court, United States Courts of Appeal, and the Supreme Court of the sister states.

The Federal questions, and rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of America, were raised and asserted before the Trail Court, Intermediate Appellate Court, and Tennessee Supreme Court.

Petitioners would show that their trial was constitutionally defective for the following reasons, *interalia:*

1. PETIONERS WERE DENIED A FAIR TRIAL BY WAY OF PROSECUTORIAL MISCONDUCT WHERE PROSECUTING ATTORNEYS GRANTED PROSECUTION WITNESSES IMMUNITY FROM PROSECUTION; AND WHERE PROSECUTING ATTORNEYS RESTORED TO PROSECUTION WITNESSES CONFISCATED MONEY FROM THE SALE OF ILLIEGAL DRUGS; ANS WHERE PROSECUTING ATTORNEYS FAILED TO DISCLOSE SAID GRANT OF IMMUNITY AND

RESTORATION OF CONFISCATED MONEY AFTER A DISCOVERY MOTION UNDER *BRADY V. MARYLAND.*

A. STATEMENT OF THE FACTS.

The record before the Trail Court reflects that all of the alleged victims admitted selling marijuana at the apartment named in the indictment. In the apartment where the incident occurred, there was $11,000.00, which the drug pushers admitted was the proceeds of the sale of marijuana. Furthermore, the police recovered a bottle containing more than six thousand units of LSD.

Butler, one of the alleged victims, testified that he had been assured by his lawyer that he would not be prosecuted; and Davis, another alleged victim, said the prosecutor told him that he would not be indicted because the State did not have corroborating proof. None of the three drug pushers were indicted for possession or sale of marijuana and LSD by the time of the trail, by the time the motion for new trial was argued, or by the time of appeal. They have gone completely unprosecuted for substantial drug offenses.

the $11,000.00 from the sale of illegal drugs was recovered by the police and transferred to the office of the District Attorney General. Two months prior to the trial, an assistant prosecutor returned $2,000.00 of the money to Butler, one of the drug pushers. This came out for the first time during trial. Another assistant prosecutor stood up and announced to the Court and jury that the balance of $9,000.00 would be given over to the DEA (Drug Enforcement Administration). However, shortly after trial, the assistant prosecutor signed a motion and court order by which the Court returned the $9,000.00 to the drug pushers.

Butler, Woods, and Davis got the benefit of the entire $11,000.00. They were the chief prosecution witnesses against the Petitioners, and accused them of robbery,

burglary, and assault.

Prior to the trial, the Petitioners filed a motion for discovery under State law, and pursuant to *Brady v. Maryland*, 373 U.S. 83, 83rd S.Ct. 1194 (1963), asking the State to disclose any exculpatory evidence. The State completely failed to disclose that the prosecution witnesses were given immunity from prosecution for the possesion and sale of marijuana and LSD, that they had been given $2,000.00 of the confiscated drug money, and that they were to receive the balance of $9,000.00 after trial.

B. Where the Federal Question Was Raised.

Petitioners will show where the Federal questions were raised by reference to the technical record and transcript of the evidence included in the record on appeal submitted to the Tennessee Court of Criminal Appeals and to the Tennessee Supreme Court. References to the technical record are made as follows: (R., vol. 1, p. 1). References to the court reporter's transcript of the evidence are made as follows: (Tr. 1).

The petitioners filed a pre-trial motion asking for all exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83rd S.Ct. 1194 (1963). (r. vol. 1, p. 25, 31) The prosecuting attorneys never disclosed the fact that more than six thousand units of LSD were found at the apartment of the prosecution wirnesses. The prosecuting attorneys never diclosed before trail that $2,000.00 of the money, which was the proceeds of the sale of marijuana, was restored to the prosecution witnesses two months before trial. These facts came out in the cross examination of the prosecution witness, Lt. Vos, who was the investigating officer. Counsel for the Defendants announced to the Court that he had never been advised of the existence of the LSD. (Tr. 1124-1126) Defense counsel also only learned that the drug pushers had been restored $2,000.00 of the confiscated money at trial. (Tr. 79, 80) Whil the drug pusher was being cross examined

about the balance of $9,000.00, the prosecuting attorney announced a stipulation that the money would be returned to the DEA. (Tr. 403) After trial, the prosecuting attorney signed a motion and court order restoring the balance of the $9,000.00 of the confiscated drug money to the drug pushers, who had testified for the state. (R., vol. 1, p. 75, 76, 77)

Counsel for Defendants also stated that he was never advised that the prosecuting witnesses were promised immunity from prosecution. However, LT. Vos. stated that the prosecution witnesses had not been indicted for possession or sale of marijuana and LSD at the time of trial. (Tr. 401) Defense counsel further supplemented the record by filing an affidavit at the time of motion for new trial stating that the prosecution witnesses had not been indicted or prosecuted.

The Federal questions were again asserted by motion for new trial, which was overruled.

Petitioners assigned as error to the Intermediate Appellate Court that the LSD was not disclosed prior to trial. The Court of Criminal Appeals ruled that there was not error because the defense learned of the LSD during trial, and did not move for sanctions for failure to grant discovery. (App. A, p. 8) The Petitioners humbly disagree with the Court because the defense did not gain the information at a time early enough to properly investigate and effectively confront witnesses; and because the defense invoked the only sanction available, that is it objected to the admission of evidence, which was overruled by the Trial Court.

The Petitioners also assigned as error to the Intermediate Appellate Court that the prosecution witnesses were restored to $2,000.00 prior to trial, and the balance of $9,000.00 after trial; which money was the proceeds of the sale of illegal drugs. Again, the Intermediate Appellate Court ruled that there was no error because the evidence which was suppressed or undisclosed at trial in the presence of the Court and jury.

(App. A, p. 10) Petitioners disagreed with the Court because the payment of the large sum of money so polluted the witnesses as to deprive the accused of a fair trial, and because they were not given the information at an early enough time to investigate and effectively confront.

The Petitioners further presented this question for review in petitioning for a discretionary appeal to the Tennessee Supreme Court, but their appeal was denied without explanation. (App. C)

2. PETITIONERS WERE DENIED THE RIGHT TO REMAIN SILENT WHERE THE TRIAL COURT ALLOWED DEFENDANTS TO BE CROSS-EXAMINED FOR IMPEACHMENT AT TRIAL CONCERNING THEIR SILENCE AFTER BEING ADVISED OF THEIR RIGHT TO REMAIN SILENT UNDER *MIRANDA V. ARIZONA*, AT THE TIME WHEN THE SEARCH WARRANT WAS SERVED.

The Petitioners also assert that they were denied their right to remain silent where the Trial Court allowed them to be cross-examined about their silence at the time the search warrant was served. Lt. Clyde Kennan of the Memphis Police Department secured a search warrant to search the apartments of the Petitioners. When Lt. Kennan served the warrants, he advised the Petitioners of their right to remain, specifically referring to *Miranda v. Arizona*, 384 U.S. 468, 86 S.Ct. 1625 (1967). The Petitioners chose to remain silent.

At trial, the Petitioners testified that they did not commit robber, burglary, or assault; but that they went into the apartment; and that one of the drug pushers pulled a pistol on the lessee of the apartment; and that the drug pushers started an altercation. The Court allowed the State to cross-examine the Petitioners, then Defendants, concerning why they had not given their explanation at the time the search warrant was served.

Counsel for defendant objected on Fifth Amendment ground each time the topic of their silence at the time of the serving of the search warrants was raised by the State, but the Court overruled the objection.

B. Where the Federal Queston Was Raised.

Counsel for Petitioners repeatedly objected at the time of trail on Fifth Amendments grounds, and the Court overruled the defense objections. (Tr. 854, 1007-1008, 1011, and 1047-1049) This error was also assigned in the motion for new trial, and overruled.

The error was then presented to the Intermediate Appellate Court. The Court of Criminal Appeals ruled that there was no error with regard to Petitioner Leake because when he was asked the question, the defense objection was sustained. (App. A, p. 14) Petitioner humbly disagrees with the Court of Criminal Apeals, and would show that he made repeated objections on Fifth Amendment grounds, which were overruled. (Tr. 1007, 1009, 1010) Then after repeated overruling his objection, the Trial Court finally sustained the objection. (Tr. 1011) The Court of Criminal Appeals further ruled that no error occurred with regard to Petitioner Russell when he was asked similar questions, because the Petitioner withdrew his objection. Petitioners disagree with the Court of Criminal Appeals because the Petitioner in fact objected at least twice to the question, and the Court overruled the defense objections. (Tr. 781, 782, 854; In effect, the prosecution was allowed to do all of the damage. Then Petitioner did withdraw his objection and offered to answer the question. (Tr. 854)

This error was assigned in the request for permission to appeal to the Tennessee Supreme Court, but was denied withour explanaton. (App. B)

3. PETITIONERS WERE DENIED THE RIGHT TO SUBMIT WITNESSE IN THEIR OWN BEHALF WHERE THE TRIAL COURT EXCLUDED UNDER THE HEAR-

SAY RULE TESTIMONY OF WORDS OF INVITATION ONTO PREMISES IN A BURGLARY CASE, AND TESTIMONY OF WORDS OF DANGER, THREAT, FEAR, AND PROVOCATION IN AN ASSAULT CASE.

A. STATEMENT OF FACTS.

Petitioners would show that they were denied the right to submit witnesses in their own behalf, contrary to the Sixth Amendment to the United States Constitution, because the Trial Court unlawfully restricted the testimony to be offered by their witnesses.

One of the charges in the indictment was that the Petitioners were quilty of burglary. The proof was that the three alleged victims, Butler, Woods, and Davis, were staying at an apartment leased to John Bass. The Petitioners knew John Bass because he was the manager of a Holiday Inn lounge in their police district; and they also knew Mike Pope, because he was a Holiday Inn security guard. The Petitioners testified that there was a warrant outstanding for the arrest of the wife of John Bass; and that Bass invited them over to his apartment for a drink to discuss the matter. The alledged victims, who are drug pushers, were staying in Bass' apartment. Mike Pope, the security guard, was present at the time the invitation was made; however, on objection by the State, the Court would not allow Mike Pope to testify that he heard the words of invitation, on the grounds allowed to testify, he would have corroborated the Petitioners' testimony that they were invited onto the premises by the lessee, thereby negating the element of breaking and entering in a burglary case.

In the aggravated assault case, the Petitioners testified that the drug pushers started the altercation. Mike Pope would have testified that he heard one of the drug pushers shout "*He's got a gun*" right before the altercation started. However, the Court sustained the State's objection to the testimony upon the grounds that it would be hearsay. Mike Pope was not allowed to testify

to the words of threat, danger, fear, and provocation uttered by the drug pushers immediately before and during the altercation.

Petitioner Russell testified that one of the drug pushers was pointing the gun at John Bass, and that Petitioner Leake was trying to subdue him. Then another of the drug pushers ran by Russell, and Petitioner Russell stopped him.

B. Where the Federal Question Was Raised.

Defendants contend the Trial Court denied them the right to submit witnesses.

The Petitioners attempted to submit the testimony of Mike Pope, who overheard John Bass, the lessee, invite them onto the premises; but the State objected, and the Court sustained the State's objection. (Tr. 504, 512-516)

Thereafter, the Petitioners attempted to show that the language of danger, threat, fear, and provocation was shouted immediately prior to the altercation, including the statement *"He's got a gun"*, but the State objected on hearsay grounds, and the Court sustained the State's objection. (Tr. 546)

This error was assigned at the motion for new trial and overruled.

The Petitioners raised this issue at the Intermediate Appellate Court; and the Court of Criminal Appeals agreed that the Trail Court erroneously excluded the testimony, because words of invitation are not hearsay. (App. A, p. 15) The Court of Criminal Appeals also stated that the words *"He's got a gun"* were erroneously excluded because they were part of the *res gestae.* (App. A, p.16.) However, the Intermediate Appellate Court stated that these were harmless errors within the meaning of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967). (App. A, p. 17) Petitioners humbly disagree with the Court of Criminal Appeals because the straight forward testimony of their offered witness could have changed the jury's mind, and because harm is

presumed to flow from a Constitutinal error.

This issue was raised in the application for permission to appeal to the Tennessee Supreme Court, but was denied without explanation. (App. B)

4. DEFENDANTS WERE DENIED THE RIGHT TO CONFRONTATION OF WITNESSES WHERE THE TRIAL COURT ADMITTED INTO EVIDENCE THE HEARSAY CONTENTS OF A SEARCH WARRANT AFFIDAVIT.

A. STATEMENTS OF THE FACTS.

Petitioners would show that they were denied the right to confront witnesses against them where the Trial Court admitted into evidence at trial the hearsay contents of a search warrant affidavit. The right of confrontation is guaranteed by the Sixth Amendment to the United States Constitution.

The affidavit accused the Petitioners of robbery, Burglary, and assault. The contents of the hearsay affidavit came in through the testimony of Lt. Clyde Keenan. Lt. Keenan was not the affiant. The affiant was Lt. Vos, and the information in the affidavit was given to Lt. Vos by Larry Butler, one of the drug pushers. Therefore, the jury was read the contents of the search warrant, which contents were hearsay upon hearsay.

B. Where the Federal Queston Was Raised.

Counsel for Defendants objected to the hearsay testimony in the affidavit during trial; but the defense objection was overruled. (Tr. 1050, 1051, 1059, 1060)

The issue was also raised at the time of the motion for new trial, but was overrulled by the Trial Court.

The error was also submitted to the Intermediate Appellate Court, which ruled no error occured, because the affidavits were not exhibited to the jury. (App. A, p. 13) Petitioners humbly disagree with the Court of Criminal Appeals because the record does not reflect that

the affidavit was kept from the jury. The affidavit was a trial exhibit, ad opposed to an exhibit for indentification; and Tennessee trial practice is to pass trial exhibits to the jury.

The question was also raised in the application for permission to appeal to the Tennessee Supreme Court but was denied withour explanation. (App. B)

IX.
REASONS FOR THE ALLOWANCE OF THE WRIT

Petitioners would show that review by writ of certiorari should be granted because the Tennessee Supreme Court, A State Court of last resort, has decided a Federal question in a way in conflict with the decision of the United States Supreme Court, of the United States Courts of Appeals, and of the Supreme Courts of other states.

1. DEFENDANTS WERE DENIED A FAIR TRIAL BY WAY OF PROSECUTORIAL MISCONDUCT WHERE PROSECUTING ATTORNEYS GRANTED PROSECUTION WITNESSES IMMUNITY FROM PROSECUTION; AND WHERE PROSECUTING WIT- ATTORNEYS RESTORED TO PROSECUTION WIT- NESSES CONFISCATED MONEY FROM THE SALE OF ILLEGAL DRUGS; AND WHERE PROSECUTING ATTORNEYS FAILED TO DISCLOSE SAID GRANT OF IMMUNITY AND RESTORATION OF CONFISCATED MONEY AFTER A DISCOVERY MOTION UNDER *BRADY V. MARYLAND.*

Prosecutorial misconduct denied Petitioners a fair trial within the meaning of the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States of America. The decision of the Tennessee Supreme Court was in conflict with the decision of the United States Supreme Court, The United States Courts

of Appeals, and the Supreme Courts of other states.

The Petitioners were denied a fair trial and due process of law by the prosecution's suppression of material favorable to the defense of the accused, and in the following particulars:

1. The prosecution failed to disclose that the State's witnesses, three drug pushers, were granted immunity from prosecution for the offense of possession and sale of marijuana.

2. The prosecution failed to disclose that the State's witnesses, drug pushers, were granted immunity from prosecution for the offense of possession of LSD.

3. The prosecution failed to disclose that a bottle containing six thousand units of LSD was recovered from the apartment where the prosecution witnesses lived.

4. The prosecution failed to disclose that prior to trial the State returned to the prosecution witnesses the sum of $2,000.00, which confiscated proceeds from the sales of illegal drugs.

5. The prosecution failed to disclose that after trial, where the witnesses has testified on behalf of the State, the State returned the balance of $9,000.00 of the confiscated drug proceeds money.

The State's witness, Larry Butler, admitted that the source of the $11,000.00 was from his own sale of marijuana, a controlled substance. During the trial the prosecuting attorneys stipulated that the money would be returned to the DEA (Drug Enforcement Administration). However, after trial the prosecutors signed a motion and court order restoring the $9,000.00 balance to the State's witnesses.

The Defendants were denied a fair trial and due

process of law under the Fourteenth Amendment by such prosecutorial misconduct because it polluted the criminal prosecution, and irrevocably biased and prejudiced the witnesses against them.

It has long been established that prosecutorial conduct during the trial of a criminal case must be consistent with due process of law under the Fourteenth Amendment. The prosecutor has a constitutional duty to disclose evidence which would be exculpatory to the Defendant. The United States Supreme Court imposed this requirement in a line of case beginning with *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935) and continuing unto *United States v. Agurs*, 426 U.S. 733, 96 S.Ct. 2392 (1976). In each case succeeding *Mooney*, the Supreme Court expanded and elaborated on the prosecutor's Constitutional duty to disclose.

In the beginning the Court held in *Pyle v. Kansas*, 317 U.S. 213, 53 S.Ct. 177 (1942) that the prosecutor could not knowingly allow a defendant to be convicted upon perjured testimony of a witness, even if the testimony was not offered or suborned by the prosecution. Petitioners would submit that in this case the prosecutor allowed the investigating officer to testify that he had only recovered a little bottle containing pills, and not disclose that the pills were LSD. This discrepancy was only developed as the result of defense investigation during trial.

The prosecution's duty to disclose evidence was significantly expanded in the landmark case of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). *Brady* made a clean break from the older cases which limited prosecutorial misconduct to the use of perjured testimony. In the *Brady* case, the prosecution failed and neglected to disclose that a person other than the defendant had confessed to committing the crime for which the defendant was charged. The defense had requested to examine the other person's pre-trial statements, but the request was not granted. The

Supreme Court held that the Defendant was denied due process of law, with the following language:

> Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution. (83 S.Ct. 1195)

The Supreme Court further expanded the prosecutor's duty in the case of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972). In *Giglio*, the Court held that evidence relating to the credibility of a witness must be disclosed to the defense, in the following language:

> Where the "reliability of a given witness may well be determinative of guilt or innocence," non-disclosure of evidence affecting credibility falls within this general rule. We do not, however, automatically require a new trial whenever a "combing of the prosecutor's file after the trial has disclosed evidence possibly useful to the defense, but hor likely to have changed the verdict..." *U.S. v. Keough*, 391 F.2d 138, 148 (2nd Cir. 1968) A finding of materiality of evidence is required under *Brady*, supra.
>
> A new trial is required if *"the false testimony could... in any reasonable likelihood, have affected the judgement of the jury."* *Napue*, supra.
>
> Here the government's case depended almost entirely on Taliento's testimony; without it, there could have been no indictment and no evidence to carry the case to the jury.
>
> Taliento's credibility as a witness was, therefore, an important issue in the case, and evidence of any understanding or agreement as to future prosecution would be relevant to his

> credibility, and the jury was entitled to know it. (92 S.Ct. 766)

Petitioners would particulary call the Court's attention to the case of *DeMarco v. United States*, 415 U.S. 449, 94 S.Ct. 1185 (1974), because it is a case where plea bargaining had gone on with the prosecution witness prior to trial. The Court set out the priciple of law as fo'lows:

> Unquestionably, had there been a promise to ..ne witness prior to his testimony, *Giglio v. United States*, citation ommitted, *Napue v. Illinois*, citation ommitted, did require reversal of the petitioner's conviction. It is clear that there was a plea bargain between the witness and the government at some point, the question being whether it was made after or before petitioner's trial. This factual issue was dispositive of the case, and it would have been better practice not to resolve it in the Court of Appeals based upon the materials then before the Court. The issue should have been remanded for initial disposition in the District Court after an evidentiary hearing. We, therefore, grant the petition for certiorari. . . (94 S.Ct. 1186)

Finally, in the case of *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976) the Supreme Court dispensed with apparent requirement in *Brady* that the defense request the material evidence. In the *Agurs* case, the Defendant was a woman convicted of second degree murder. The prosecution's theory was that the defendant was a prostitute who stabbed a victim in a robbery attempt. The defense theory was self defense. The prosecution knew that the victim had been convicted of violent crimes in the past, but the defense never asked for his record, erroneously beliecing it would inadmissible. after conviction, defense counsel discovered that they could have admitted into evidence the alleged

victim's record of violent crimes. In *Argus*, the Court confirmed the *Brady* pricipal of disclosure of material evidence, in the following language:

> The duty to respond to a general request or no request at all is dependent on the evidence itself... if the evidence is so clearly supportive of a claim of innocence that it gives prosecution notive of duty to produce, the duty should equally arise if no request is made. (96th S.Ct. 2401)

The above language from *Agurs* must be read in conjunction with the case of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967), which says that an error must be harmless beyond a reasonable doubt, otherwise the Appellant should be granted relief.

The Federal Courts of Appeals have uniformly followed the *Brady v. Maryland* line of authority. See *United States v. Harris*, 498 f.2d 1164 (3rd Cir., 1974)) *United States v. Gaston*, 608 F.2d 607 (5th Cir., 1979); and *United States v. Provenzano*, 615 F.2d 37 (2nd Cir., 1980) The Supreme Courts of several states have also followed the same rule. See *Commonwealth v. Hollowell*, 383 A.2d 909 (Pa., 1978) and *People v. Rutherford*, 534 P.2d 1341 (Cal., 1975).

Prosecutorial misconduct has long been disapproved in the State of Tennessee by the case of *Hiram Curtis v. State*, 46 Tenn. 9 (1868). The defendant was charged with the offense of "horse stealing". The prosecution kept secret the availability of the State's witnesses. The Supreme Court of Tennessee condemned the practice with the following language:

> We are satisfied that an artifice was employed to induce the prisoner to go to trial by concealing from him the fact that certain of the State's witnesses were present in inducing him tho believe that they were not present while, in fact, they were and had been concealed by the attorney for the State. It is easy to see how a fraud might be

> practiced upon a defendant by this means, and whether in this case he actually was injured by the artifice or not it is sufficient ot see that he might have been and that the practice if permitted in the future would open avenues for fraud and oppression. The duty of the attorney for the State is to adduce all of the legitimate proof of the prisoner's guilt, but it is not his duty to endeavor to secure conviction which he is not entitled under legitimate evidence and fair practice. And, if a defendant cannot be convicted under this rule, the State has no interest to have him convicted. The Supreme Court of Michigan reversed a criminal case for the reason that the District Attorney knowing of evidence which would make in favor of the defendant, did not place it before the jury. The prosecuting officers must discharge their duty to State, but not resort to strategems to deprive a prisoner of his legal rights. (46 Tenn. 11)

The Petitioners assert that they were greatly prejudiced by the failure to disclose material evidence by the prosecution. Had they known of the existance of the six thousands units of LSD and the offered immunity from prosecution, and the restoration to $11,000.00 of confiscated drug money, then they could have prepared a long and compelling defense focused on destroying the credibility of the prosecution witnesses.

In *United States v. Agurs*, supra., the Supreme Court stated it would apply the strict standard of prosecutorial misconduct, for the following reason:

> . . . not just because they involved prosecutorial misconduct, but more importantly because they involved the corruption of the truth-speaking function of the trial process.

Defendants contend that the prosecution offered immunity for the three drug pushers who were witnesses against them. The offer of immunity is an inescapable

conclusion of fact because many months have elapsed since the case, and the State has failed and neglected, obviously through agreement, to indict the drug pushers. Furthermore, the sum of $11,000.00 was restored to drug pushers after their testimony for the State. The State refused to disclose and verify the existence of the agreement of immunity; however, the witnesses alluded and suggested that they were the beneficiaries of an agreement of immunity.

The Government's failure to disclose that a key witness was promised dismissal in return for his testimony has been held to the basis for a new trial in the case of *United States v. butler*, 567f. 2d 885 (10th Cir., 1978). Also in the case of *U.S. v. Harris*, 498 F. 2d 1164 (2nd Cir., 1974), certm den 95 S.Ct. 635, the Court of Appeals ruled it to be reversible error where the government intentionally or inadvertently failed to correct material, false testimony relevant to the credibility of government witnesses at trial, including the evidence concerning any understanding or agreement as to future prosecution between the witnesses and the government.

In the case of *Freeman v. Georgia*, 599 F.2d 65 (5th Cir., 1979) the Court held that a police officer's knowing concealment of a witness amounted to State suppression of evidence favorable to the accused, thereby depriving him of due process, where the evidence might have created a reasonable doubt.

Therefore, Petitioner would show that they were denied a fair trial within th meaning of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and this Honorable Court should grant the writ of certiorari to correct the errors set out in this petition.

2. PETITIONERS WERE DENIED THE RIGHT TO REMAIN SILENT WHERE THE TRIAL COURT ALLOWED DEFENDANTS TO BE CROSS-EXAMINED FOR IMPEACHMENT AT TRIAL CONCERNING THEIR SILENCE AFTER BEING ADVISED OF THEIR

RIGHT TO REMAIN SILENT UNDER *MIRANDA V. ARIZONA*, AT THE TIME WHEN THE SEARCH WARRANT WAS SERVED.

The Tennessee Supreme Court completely failed to follow the direction of the United States Supreme Court in ruling on the use of post-Miranda warning silence for impeachment. The United States Supreme Court ruled upon the law of post-Miranda warning silence in the case of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976). In *Doyle*, the defendant was advised of his Miranda rights and declined to give a statement at the time of his arrest. At trial he gave an exculpatory explanation of his conduct. The prosecution was permitted by the trial court to cross-examine and impeach by reference to his silence at the time of his arrest. The Supreme Court ruled that it was unfair, in the following language:

> The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, see *Michigan v. Tucker*, citation ommitted, require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of the Miranda rights. Thus, post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. See *United States v. Hale*, citation ommitted. Moreover, while it is true that the Miranda warnings contain no express assurnace that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to

> impeach an explanation subsequently offered at trial. (96 S. Ct. 2244, 2245)

The Supreme Court affirmed and repeated the application of *Doyle v. Ohio* in recent case of *Jenkins v. Anderson*, 48 U.S.L.W. 4693 (June 10, 1980). The Sixth Circuit Court of Appeals has also established this proposition in the case of *Minor v. Black*, 520 F. 2d 1 (6th Cir., 1975).

Petitioners would show that the essence of *Doyle v. Ohio* is that a person should not be impeached or penalized for silence after he has been told he may lawfully remain silent. The factual situation in the Petitioners' case is almost identical to the factual situatuion in *Doyle v. Ohio.* The Petitioners were at their respective apartments, when arresting officers came with the search warrant. One of the arresting officers advised the Petitioners of their right to remain silent, specifically referring to *Miranda v. Arizona*, 384 U.S. 468, 86 S.Ct. 1625 (1967). The Defendants chose to remain silent. Thereafter, the prosecutor asked the following question to Petitoner Leake:

> Q Fine. And Officer Keenan gave you an opportunity to explain what you considered a false accusation out there that night and you didn't tell him a word of it, did you? (Tr. 1011)

Then, the prosecutor asked a substantially similar line of questions to Petitioner Russell. (Tr. 781) The prosecutor apparently had not read *Doyle v. Ohio*, where substanitially the same kind of cross examination was performed:

> Q (By the Prosecutor) Mr. Beamer did arrive on the scene?
>
> A (By Wood) Yes, he did.

> Q And I assume you told him all about what happened to you?
>
> A No. (96 S.Ct. 2243)

Therefore, Petitioners submit that their trial was prejudiced by a constitutional error. In the case of *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir., 1979), the Sixth Circuit made this statement with regard to harmless error, in the Fifth Amendment context:

> Harmless error, in the context of violation of the constitutional right of a defendant, is an extremely narro standard, permitting the State to avoid the retrial of a defendant, only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant.
>
> . . . . .
>
> Harm is presumed tho have flowed from constitutional error; the burden is on the State to demonstrate conclusively to the contrary. It is not enough for the reviewing Court to feel that the evidence is strong and that the defendant probably would have been conficted anyway. This is a decision for the jury to make, unaffected by improper argument or impermissible inferences urged by the prosecutor. (605 F.2d 278-279)

3. PETITIONERS WERE DENIED THE RIGHT TO SUBMIT WITNESSES IN THEIR OWN BEHALF WHERE THE TRIAL COURT EXCLUDED UNDER THE HEARSAY RULE TESTIMONY OF WORDS OF INVITATION ONTO PREMISES IN A BURGLARY CASE, AND TESTIMONY OF WORDS OF DANGER, FEAR, AND PROVOCATION IN AN ASSAULT CASE.

Petitioners would show that by excluding testimony of invitation onto premises and words of danger, threat,

fear, and provocation under the hearsay rule, the Tennessee Supreme Court and Tennessee Court of Criminal Appeals has ruled in conflict with the decisions of the United States Supreme Court and the Sixth Amendment of the United States Constitution.

The factual predicate for this assertion is that the Petitioners were charged with burglary, and they sought to submit testimony of a security guard who overheard the lawful lessee of the premises invite the Petitioners onto the premises. The Petitioners were also charged with assault, and they sought to submit the testimony of a security guard who heard a drug pusher shout "He's got a gun" right before the altercation began. Both offers of proof were rejected by the Trial Court; and the Trial Court's decision was affirmed by the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court.

Petitioners would show that the exclusion of the testimony was contrary to well-established principles of Tennessee law governing hearsay. In fact, the Tennessee Court of Criminal Appeals ruled that the evidence was wrongfully excluded. The Court of Crlminal Appeals correctly noted that the hearsay proposition is governed in Tennessee by the case of *Bennett v. State*, 530 S.W.2d 788 (Tenn. Cr. App., 1975), which states as follows:

> Since a mere instruction or a request or order by one person to another to do something obviously is not a statement to fact, testimony by a witness that he heard the instruction or request or order cannot without more be heresay. It depends in no way on the ceracity or credibility of the outpot-court declarant; it merely relates to the fact that the other person made the statement, and makes no assertion with reference to its truth and is not offered for that purpose. (530 S.W.2d 793)

The Court of Criminal Appeals also acknowledged that the words *"He's got a gun"* should not have been excluded, but should have been admitted into evidence

as part of the *res gestae*, citing *Ellison v. State*, 549 S.W.2d 691 (Tenn. Cr. App., 1976). Therefore, the law of the case is that evidence was wrongfully excluded in this cause.

Petitioners would show that it is a denial of due process of law under the Fourteenth Amendment for a state to deny a defendant the benefit of established procedures under state law, where the denial is fundamentally unfair. As authority for this proposition see *Hill v. United States*, 368 U.S. 424, 82nd S.Ct. 468 (1962), and *Klimas v. Mabry*, 599 F.2d 842 (8th Cir., 1979). The denial of the submission of the testimony in this case is fundamentally unfair because it prevented the defendants in this case from submitting their witnesses to the jury under the Sixth Amendment.

It is well-established hearsay law in Tennessee and across the land that certain out-of-court declarations are not excluded as hearsay. *McCormick on Evidence* gives the following treatment of this proposition:

> 249. *Out-of-Court Utterances Which Are Not Hearsay*
> The hearsay rule forbids evidence of out-of-court assertions to prove the facts asserted in them. Manifestly, proof of utterances and writings may be made with an almost infinite variety of other purposes, not resting for their value upon the veracity of the out-of-court declarant and hence falling outside the hearsay classification. (*McCormick*, Ch. 24, Sec. 294).

Professor McCormick goes on to ser out examples such as verbal acts, words of instruction, and excited utterances, all of which were acknowledged by the Tennessee Court of Criminal Appeals.

The United States Courts of Appeals have generally acknowledged that there are certain cases in which the hearsay rule is inapplicable. In the case of *Safeway Stores, Inc., v. Combs*, 273 F.2d 295 (5th Cir., 1960), the

Court ruled that the hearsay rule was inapplicable to an utterance proved as an operative fact. (273 F.2d 296) In the *Safeway Stores* case, the Court ruled that words of warning should not be excluded as hearsay.

The Supreme Court ruled in the case of *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967), that the right to offer witnesses is fundamental:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts of well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution of challenging their testimony, he has a right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. (87th S.Ct. 1923)

The Supreme Court has also ruled that the application of state hearsay rules can violate fundamental due process of law, in the case of *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973). in *Chambers* the Court acknowledged that "a number of exceptions have been developed over the yaers to allow the admission of hearsay statements..." (93rd S.Ct. 1047) In the *Chambers* case, the State of Mississippi did not recognize declarations against penal interest to be an exception to the hearsay rule. The defendant in that case sought to offer hearsay testimony that another had confessed to the crime of which he was charged. The Supreme Court found that the application of the hearsay rule violated fundamental fairness:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. (Citations omitted) In the exercise of this right, the accused, as is required of the state, must comply with established rules of procedure in evidence designed to assure both fairness and reliability in the

ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trial than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interes That testimony was also critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

We conclude that the exclusion of this critical evidence, coupled with the state's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. (93rd S.Ct. 1049)

In the case of *Green v. Georgia*, 99 S.Ct. 2150 (1979), the Supreme Court had the following factual situation. The defendant sought to introduce the testimony of a fellow inmate in a jail. The fellow inmate would testify that a third party confessed to having committed the murder, with which the defendant was charged. The hearsay testimony of the confession was excluded under Georgia law. The Supreme Court ruled as follows:

Regardless of whether the offered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the due process clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial... (Citations omitted), and substantial reasons existed to assume its reliability. (99th S.Ct. 2151)

Therefore, Petitioners would show that they were denied the right to present witnesses in their own behalf under the Sixth Amendment to the United States Constitution, and ther were denied due process of law under the Fourteenth Amendment to the United States Constitution. Petitioners were denied the benefit of law of Tennessee in a Tennessee criminal proceeding. Petitioners would, therefore, again call the Court's attention to the case of *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir., 1979), where the Sixth Circuit stated *"harm is presumed to have flowed from constitutional error."* Petitioners assert that they had a right to jury trial where the jury heard all of the evidence.

4. PETITIONERS WERE DENIED THE RIGHT TO CONFRONTATION OF WITNESSES WHERE THE TRIAL COURT ALLOWED INTO EVIDENCE AT TRIAL THE HEARSAY CONTENTS OF A SEARCH WATTANT AFFDAVIT.

Petitioners would show that the Tennessee Supreme Court, in denying appeal from a decision of the Tennessee Court of Criminal Appeals, has decided the Petitioners' case in conflict with the confrontation clause of the Sixth Amendment of the United States Constitution, because the Tennessee Courts allowed the jury to be read the hearsay contents of a search warrant affidavit. The Sixth Amendment clearly grants the accused the right *"...to be confronted with the witnesses against him..."*; and the submission of affidavit testimony denies confrontation and cross-examination.

Hearsay is defined in *McCormick's Law of Evidence* as follows:

> Hearsay evidence is testimony in court or written evidence of a statement made out of court, such statements being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court

assertor. (McCormick, Ch. 24, Sec. 225)

The *McCormick* definition has been adopted by the Tennessee Court of Criminal Appeals in the case of *Bennett v. State*, 530 S.W.2d 788 (Tenn. Cr. App., 1975).

The Supreme Courts of several states have ruled that affidavits or depositions cannot be used in a criminal prosecution. See *State v. Hooks*, 446 P.2d 770 (Kan., 1968). The Tennessee Supreme Court has also ruled that the state could not introduce into evidence the test results of experts in a drug prosecution, in the case of *State v. Henderson*, 554 S.W. 2d 117 (Tenn., 1977).

The Supreme Court has discussed the application of the hearsay rule to criminal prosecution in the recent case of *Ohio v. Roberts*, 48 U.S.L.W. 4874 (June 25, 1980). The general principle was set out by the Supreme Court as follows:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the confrontation clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." reliability can be inferred without more in a case where the evidence falls within a firmly-rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized quarantees of trustworthiness.

The Supreme Court went on to state that since the offered hearsay bore the "indicia of trustworthiness" and the declarant was unavailable, there was not constitutional error. Petitioners would point out that in this case the hearsay declarants were in fact available within the constitutional sense in their case.

Therefore, Petitioners would show that they were denied the right to confrontation by the submission of the hearsay affidavit in the search warrant. The jury should have heard only the testimony of the witness, and the testimony of the witness should not have been bolstered

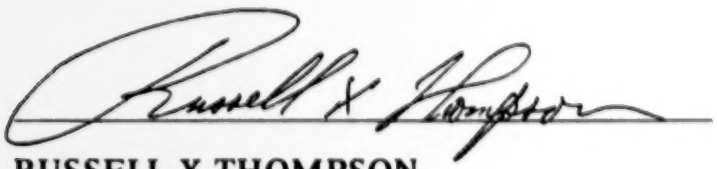
by the submission of a plainly hearsay document.

X.

CONCLUSION AND PRAYER

Petitioners respectfully request the Supreme Court, for all of the reasons set out above, to grant the writ of certiorari, to reverse the decision of the Tennessee Supreme Court and the Tennessee Court of Criminal Appeals below, because the decision of the Tennessee Courts is in conflict with the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, the decisions of the Supreme Court, the decisions of the United States Courts of Appeals, and decisions of the Supreme Courts of other states.

Respectfully submitted,



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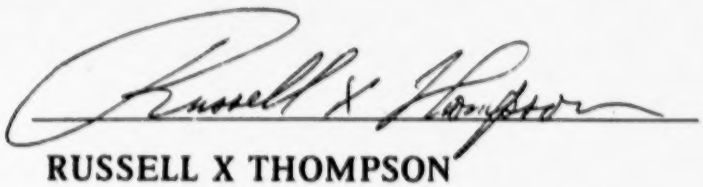
XI.

CERTIFICATE OF SERVICE ON COUNSEL

I, Russell X Thompson, *Attorney for Petitioners*, hereby certify, pursuant to Rule 28.3 of the Rules of the Supreme Court, that I have mailed three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Tennessee to Mr. William M. Leech, Jr., Attorney General of the State of Tennessee, and to Mr. Charles L. Lewis, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee, on this _____ day of September, 1980.



RUSSELL X THOMPSON

APPENDIX "A"

AT JACKSON

MARCH 1980

STATE OF TENNESSEE, *Appellee*	NO. 48, Shelby Criminal
vs.	Honorable John P. Colton, Sr., *Judge*
J.M. RUSSELL and EUGENE LEAKE, *Appellanta*	(Assault and Battery; Burglary; Aggravated Assault)

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AFFIRMED

LLOYD TATUM, *Judge*

OPINION RELEASED: MAY 15, 1980

OPINION

The defendants were convicted of first degree burglary, aggravated assault upon Larry Butler, assault and battery upon Mike Davis, and assault and battery upon Emily Woods. They were each sentenced to serve a penitentiary sentence of ten years in the burglary case, two years in the aggravated assault case, and, they were fined $50.00 in each of the assault and battery case. Both defendants were acquitted of armed robbery. The penitentiary sentences were ordered to be served concurrently.

On this appeal, the appellants' several issues for review attack generally the following: (a) insufficient evidence to support the verdicts, (b) prosecutorial misconduct in several respects, and (c) the rulings of the court on the admission and exclusion of certain evidence. We find no reversible error and affirm the convictions.

A summary of the evens of this case is essential to establishing the proper perspective of the issues before this court. The defendants were both police officers of the City of Memphis. The offense occurred from 5:00 to 6:00 A.M. on the morning of September 26, 1978, in an apartment located in the town of Germantown. The apartment was rented to John Bass and wife, Annette Bass. John Bass had quit his job at a Holiday Inn in Helena, Arkansas. A few days before this incident, John and Annette Bass had gone to Helena, Arkansas but had left many of their belongings in the Germantown apartment. John Bass had arranged to sub-lease the apartment ot Larry Butler and his girlfriend, Emily Wood. Approximately four days prior to this incident, Mike Davis, a friend of Butler's, moved the apartment. Butler, Woods and Davis supported themselves by selling marijuana, and all three were addicted to dilaudid.

The victims - Butler, Wood, and Davis - all testified that at approximately 5:00 A.M. on September 26, the

two defendants, dressed in Memphis Police Department uniforms, broke into the apartment and demanded to know where fourteen pounds of marijuana was kept. Butler received lacerations of the head and a broken rib because he was beaten with a gun and kicked in the ribs. Wood and Davis were also threatened and beaten. The victims had previously possessed fourteen pounds of marijuana but had sold it a day or two before this incident. The marijuana, it is alleged, belonged to Butler. Only the three victims and the defendants were present in the apartment during this incident.

About 6:00 A.M., a Shelby County Deputy Sheriff knocked on the door in an attempt to serve a detainer warrant on John Bass, and the defendants left, taking $300.00 from Butler's waller and a quantity of cocaine and dilaudid. The proceeds of prvious drug sales ($11,000.00), which had been hidden in a recliner chair in the living room, were not discovered by the defendants. The defendants left a police walkie-talkie in the master bedroom closet where defendant Russell had been searching for the marijuana.

Immediately after the defendants left, Emily Woods' father telephoned and talked with her. She was screaming that something "*bad had happened.*" Being apprehensive and not knowing his daughter's address, he telephoned the police and gave them the telephone number.

Shortly after the defendants left, the Deputy Sheriff with the detainer warrant again knocked on the door, and Butler told him what had happened. Being afraid that the defendants would return for the radio, the victims left the apartment, took the police walkie-talkie, and went to Butler's sister's home.

The victims had left the $11,000.00 in the apartment and telephoned to determine if anyone was at the apartment. One of the Germantown policemen then present at the apartment answered the phone. At his request, the victims returned to the apartment and told

the policeman about the robbery. The Germantown police officers found the apartment ransacked, with clothing and linens emptied out of closets and drawers. These officers also observed blood on the bedroom walls where the victims testified that the defendants had forced them to stand during the search for the marijuana. Subsequently, the investigating police officers took possession of the $11,000.00

Joe Goldberg, a newspaper carrier, testified that he delivered the *Commercial Appeal* newspaper in this area every morning usually between 4:45 and 5:30 A.M. When he first arrived on this particular day, he observed a police car and *"a tall, slender, black officer."* A few minutes later, he observed that the black policeman was accompanied by a white policeman and they were attempting to forcibly enter the back door of the aprtment.

Shelby County Deputy Sheriff Bill Murry testified that at 6:00 A.M., he knocked on the apartment door to serve the detainer warrant. Although he could see shadows of people moving about upstairs and could hear loud angry voices, no one answered the door. The deputy kicked the door three or four times and started to walk away when a black Memphis Police Officer came out the door and said, *"We got a narco bust here."* As the deputy followed the policeman across the parking lot, the policeman turned and said, *"Wait here at your car, and we'll get them and bring them back to you, and you can serve them."* The deputy waited and observed a Memphis Police car back out of a concealed location; thereafter, a second Memphis uniformed police officer, who came from the back of the apartment, departed with the driver of the police car.

Deputy Murry, still attempting to serve his detainer warrant, returned to the apartment and observed a partly-dressed white man with a bleeding head, who told the deputy that he had been beaten by a police officer. The deputy served the detainer warrant on him and left.

Murry identified the defendant, Leake, as the black officer he had seen coming out of the apartment.

Defendant Russell's notebook, found later, contained a paper bearing the name and address of Emily Wood.

The defendants' evidence is comprised mostly of their own testimony and that of Michael Wayne Pope. Pope at the time of this incident, was a security office at the Holiday Inn in Memphis where Bass had previously been employed. These witnesses testified that the two defendants were working together on the night of September 25-26 and that the defendants spent much of this night drinking and talking at the Holiday Inn where Pope was employed. Whil Pope did not drink, he furnished free drinks to the police officers. At about 4:30 A.M. on September 26, the defendants and Pope got in the squad car in order to go for a sandwich, and Pope concealed himself in the back seat. Before they left, John Bass came to the car and invited them to the apartment in Germantown to drink and to obtain defendants' advice concerning a charge against Bass' wife for forging a drug prescription. Bass went in his car, and the other three men followed in the Memphis Police car. Bass had a key to the apartment, and all four men entered together. Emily Wood joined them in the apartment; and, after some conversation, Bass went upstairs to get some of his belongings left in the house. Those remaining downstairs heard a comotion upstairs, and Emily Wood went upstairs. Shortly thereafter, they heard Emily Wood scream, then Pope and both of the officers ran hurriedly up the steps. The officers and Pope observed Bass in a bedroom on his knees, and Butler was standing nearby with a pistol. Officer Leake knocked Butler down by striking him twice and caused him to drop the pistol. Leake then kicked the pistol away and threw Butler against the wall. Russell put Davis against the wall and instructed Pope to get their drinking cups, radio, and whiskey, because it was urgent for them to leave immediately. Pope, Bass, and Russell went out the back

door. Russell and Pope got in the squad car, and Pope again concealed himself. They then picked up Leake, who had come out of the front door, and drove off. The defendants were afraid of being seen outside the Memphis City Limits, and they did not want Pope to be seen in the squad car because of police regulations.

The defendants soon learned that they did not have the walkie-talkie; and after searching elsewhere for it, they returned to the apartment and found no one there. In an effort to find their walkie-talkie, the defendants "*Moved stuff around*" in the apartment but did not locate it. The defendants reported to the Police Department that their walkie-talkie had been left in an automobile investigated earlier. Pope made a false entry on his security report at the Holiday Inn that he was in the parking area between 4:00 A.M. and 6:00 A.M.

The night auditor at the Holiday Inn where Pope worked testified that she saw Pope leaving with the defendants in the patrol car about 4:00 A.M. She also testified that she saw John Bass talking with the defendants at this time. There was evidence that Bass and his wife had checked into another Holiday Inn on September 25 and checked out at 3:51 A.M. None of the State's witnesses saw either Pope or Bass at or near the apartment.

While we have not burdened this opinion by detailing all of the evidence contained in this 1,162 page transcript, we find it sufficient to support the verdicts. It is the function of the jury to determine the credibility of witnesses and the weight to be given their testimony. *Braziel v. State*, 529 S.W.2d 501, 505 (Tenn. Cr. App. 1975). We cannot disturb a judgment of conviction based upon a jury verdict unless, after examing the record, we find the evidence insufficient to support a finding of a rational jury of guilt beyond a reasonable doubt. *Tennessee Rules of Appellate Procedure* 13(e); *Jackson v. Virginia*, _____ U.S. _____, 99 S.Ct. 2781 (1979). We find that the evidence meets this standard and

overrule this issue.

In the next issue. the defendants assert that the State suppressed material evidence favorable to them in three particulars: (a) the prosecutor did not disclose that Butler, Wood, and Davis were granted immunity from prosecution for drug offenses; (b) the prosectution did not disclose recovery of six thousand units of LSD found at the residence of Butler, Davis, and Wood; and (c) the prosecution failed to disclose that the sum of $11,000.00 had been or would be returned to Larr Butler. We will discuss these propositions separately, in the respective order presented.

Regarding the defendants' first particular, Butler testified that the Assistant District Attorney told him that he would be prosecuted for the sale of drugs if the State could obtain proof, other than the confession, to support a conviction. He also testified as to his lawyer's assurance that he would not be prosecuted. Emily Wood testified that she did not know whether she would be prosecuted but that she had been told that she could not be prosecuted solely on the evidence of her own confession. Davis testified that he had not been given immunity but had been advised that he could not be indicted upon his admission to have sold marijuana without any corroborative proof.[1] The evidence was conclusive that these three witnesses had not been indicted on February 26, 1979, the time of the beginning of the trial, which was approximately five months after the facts were known to the police authorities.

The record bears no evidence that the State had bound itself to these witnesses not to prosecute them. However, it is apparent from these witnesses' testimony that as a result of the advice they had received that they

[1] We glean from the testimony of these three witnesses, that they had beedn advised, in substance, that the *corpus delicti* cannot be solely established by a defendant's uncorroborated confession. See *Hodges v. State*, 491 S.W.2d 624 (Tenn.Cr.App. 1972); *Ashby v. State*, 124 Tenn. 684, 139 S.W.2d 872 (1911).

did not expect to be prosecuted and that no prosecution had been commenced against them. Based on the evidence presented, we do not find that they testified falsely or that the State had suppressed a secret agreement with these witnesses or had concealed any false evidence given by any of them.

In reference to the second particular, the defendants insist that they were denied constitutional due process because the prosecution suppressed evidence that the Germantown Police Department recovered a bottle containing six thousand units of LSD in the Germantown apartment. This evidence was elicited to support the defense theory that the victims were also motivated in testifying because of an agreement with the State that they would not be prosecuted for possessing this drug. Again, there is no evidence of any such agreement not disclosed to the jury; the Germantown Police Department, according to the record, could not establish who possessed these drugs, i.e., one or more victims or Bass and wife. In any event, this evidence was not suppressed; the fact that these pills were found was fully disclosed to the jury by State witnesses.

The defendants further insist that the State did not disclose the existence of the LSD in response to a discovery motion filed by them pursuant to Rule 16, *Tennessee Rules of Criminal Procedure.* The record reflects that the Assistant District Attorney insisted that defense counsel was advised of the existence of these drugs, but one of the two attorneys representing the defendants stated that he was not informed of the drug's existence prior to trial. No explicit record is before us indicating what was shown to defense counsel pursuant to the Rule 16 motion. *Benton v. Anderson,* 571 S.W.2d 145 (Tenn. 1978); *Murray Ohio Manufacturing Comonay v. Vines,* 498 S.W.2d 897 (Tenn. 1973). However, the cross-examination conducted by defense counsel indicates that he had learned from some source the facts surrounding the finding of the pills.

Further, the defendants did not request any of the remedies provided by Rule 16(d), (2) for failure to comply with the rule. The pills were made an exhibit to the witness's testimony, and no other remedial relief was suggested. The record does not show error with regard to the admission of the LSD pills, and no action was taken with regard to this evidence pursuant to Rule 36(a), *Tennessee Rules of Appellate Procedure.*

As above stated, the defendants also contend that there was a violation of constitutional due process because the State did not disclose that the $11,000.00 recovered by Germantown Police was returned to the State's witness, Larry Butler. Admittedly, this money was the proceeds of the sale of marijuana.

Butler testified that $2,000.00 of this money was returned to him by the State prior to trial for living expenses. With respect to the remaining $9,000.00 Butler testified:

"Q. Did anyone tell you that if these officers, police officers, got convicted that you would get your eleven thousand dollars back?

A. Not in so many words.

Q. But that's what you're hoping to get back, isn't it Mr. Butler?

A. I'd like to.

Q. Yes, sir. And isn't it true that your purpose of testifying is to see that a conviction comes down on these officers? Isn't that true?

A. I'd like justice done.

Q. And you've got eleven thousand dollars hanging up there, don't you, Mr. Butler?

A. Yes, sir, I guess you'd say that.

Q. All right. And they told you that they'd give you your eleven thousand back, didn't they?

A. No sir, they didn't.

Q. No one has told you that?

A. Well, a couple of people said I should get it back.

Q. And that's why you're up there testifying, isn't it?

A. Part of the reason."

After the defendants were convicted, Butler, through counsel, filed a petition alleging ownership of the remaining $9,000.00 and praying that his money be returned to him after an evidentiary hearing, the trail court found that Butler was entitled to the money and ordered it returned to him.

Again, we found no suppression of this evidence by the State. The defendants sought to impeach Butler's testimony by showing that $2,000.00 had already been returned to him and that Butler fully expected the return of the remaining $9,000.00 The testimony above-quoted could leave no doubt in the juror's mind that Butler expected the money to be returned to him. Anything that actually occurred with respect to the money after Butler testified would not alter Butler's state of mind at the time he gave his testimony; that is, he expected to receive the money after testifying. It was the function of the jury to weigh Butler's testimony, along with all of the other evidence in the case, in the light of Butlers admission that at least part of his motivation for testifying was his expectation to receive the money.

In support of their contentions that the State suppressed the several items of evidence discussed above, the defendants cite *Brady v. Maryland*, 83rd S.Ct. 1194 (1963); *Giglio v. United States*, 92nd S.Ct. 763 (1972); *United States v. Agurs*, 96th S.Ct. 2392 (1976); *Demarco v. United States*, 94th S.Ct. 1185 (1974); *Napue v. Illinois*, 360 U.S. 264 (1959). We have no quarrel with the holdings in these cases, but they are not applicable here. In each of the foregoing Federal cases, material and

exculpatory evidence was not disclosed before or during trial but was discovered after trial. In the present case, the evidence was not suppressed or undisclosed; on the contrary, the evidence was developed at trial in the presence of the court and jury.[2]

In the defendants' fourth issue, they complain that the State failed to provide accurate addresses for its witnesses, Butler, Wood and Davis, and that the State failed to disclosed an accurate address for John Bass until six days before the trial. The defendants had filed a pre-trial motion requesting, among other things, names and addresses if witnesses which would tend to exculpate the degendants.

With respect to the wirnesses - Butler, Wood, and Davis - it is obvious from the record that their evidence did not tend to exculpate or in anywise benefit either defendant. The State had complied with T.C.A. §§40-1708, 40-2407 by endorsing the name of these witneses on the indictment. The defendants did not object to the testimony of the witnesses on this ground or take any other action to prevent or nullify any effect of the failure of the State to furnish this information. Rule 36(a), *Tennessee Rules of Appellate Procedure.* furthermore, there is nothing in the record to indicate when the state became aware of the new addresses of these witnesses or whether the State gave the addresses of these witnesses to the defendants.

As to John Bass, the defendants do not attempt to show that his testimony would have benefited them in any respect although he gave a statement to the Germantown Police Department the day after this crime was committed. His name was not endorsed on the indictment, but he was not a witness for the State.

Moreover, the record does not support the

[2]Actually, the record does not indicate whether any of this evidence was furnished to the defense prior to trial. In any event the jury was made aware of it at trail.

defendants' insistence that the State did not furnish Bass's address promptly. At some time between the commission of this crime and February 15, 1979, Bass and his wife moved to Baton Rouge, Louisiana; the Memphis Police Department was seeking Mrs. Bass to serve a warrant for drug violation. The record does not show when the State determined that Mr. and Mrs. Bass moved to Baton Rouge, Louisiana, but on February 15, 1979, a Memphis Police Officer made a trip to Baton Rouge and talked with Mrs. Bass's attorney in the presence of Mr. Bass. On February 21, 1979, the defendants' attorney told the defendants that it was urgent for them to go to Baton Rouge to talk to Bass. On February 23, 1979, the defendants and counsel went to Baton Rouge and talked to Mr. Bass's attorney, but they were unsuccessful in their attempt to induce Bass to return to Memphis for trial. The record does not reflect when the State informed defendants' attorney of Bass's whereabouts.[3] Further, there is no indication in the record that the State was aware the defendants desired Bass as a witness or that the State was aware that the defendants did not have Bass's current address. A prosecutor owes no duty to a defendant to provide defense counsel with unlimited discovery of everything known by the prosecutor or contained in his file. *United States v. Agurs*, 96th S.Ct. 2392 (1976).

Furthermore, although the defendants complain of haveing insufficient time to compel the trial attendance of Bass, they made no motion for a continuance or took any action to prevent prejudice as required by Rule 36(a),

3. At one point, the defendant, Russell, testified that his attorney told him of Bass's whereabouts one week before the defendants made the trip to Baton Rouge, which would have been February 16 or the dav after a representative of the Memphis Police Department went to Baton Rouge. At another point, this witness testified that they went to Baton Rouge two days after their attorney learned that Bass was in Baton Rouge. Thus, the testimony on this point is conflicting hearsay.

Tennessee Rules of Appellate Procedure. For the serveral reasons stated, this issue must be resolved in favor of the State.

The defendants next complain that the trial court erred in admitting search warrants and affidavits thereon that authorize the search of the defendants' residences. The record reflects that the State did not offer the search warrants and affidavits for exhibition to the jury but merely to make these documents a part of the record. this was not error. *State v. Davis,* 204 Tenn. 553, 322 S.W.2d 232 (1959). Since these documents were not exhibited to the jury, this issue is overruled.

The defendants next insist that their Fifth Amendment rights were violated when the trial court permitted the Assistant District Attorney to cross-examine them with respect to their pre-trial silence. Defense counsel objected when the State asked Russell whether a certain police officer gave him an opportunity to tell his *"side of the story."* Before the court could rule on the objection, Russell asked the trial court to permit him to answer the question; and defense counsel then informed the court, *"We withdraw our objection. He wants to answer."* Thus, both Russell and his attorney waived Russell's Fifth Amendment rights. When the Assistant Attorney General asked Leake a similar question on cross-examination, the trial court sustained his objection. We find no error here.

The defendants next complain of the trial judge's action in excluding as hearsay portions of the testimony of defense witness, Michael Pope. The trial judge did not permit the witness to relate that the witness and the defendants were invited to John Bass's apartment by Bass and that Bass represented that the apartment was his. The defendants further aver that the court sustained an objection to testimony of a statement made by Emily Wood after she followed Bass upstairs. The defendants assert that the testimony would establish the motivation

for the defendants to go upstairs. We note that in many other instances whil defense counsel was examing this witness, counsel instructed the witness to refrain from relating oral pronouncements; in other words, much of the conversational evidence surrounding the circumstances of this event was not offered in evidence.

We concur with the defendants that the learned trial judge erroneously excluded some of Bass's testimony as being hearsay. Hearsay evidence is testimony during trial of a written or oral statement made out of court when the statement is offered to show the truth of the matters asserted therin; thus its value is dependent upon the credibility of the out-of-court declarant. *Bennett v. State*, 530 S.W.2d 788 (tenn. Cr. App. 1975).

In *Bennett v. State*, 530 S.W.2d 788, 793 (Tenn. Cr. App. 1975), this court held;

> *"Since a mere instruction or request or order by one person to another to do something obviously is not a statement of fact, testimony by a witness that heard the instruction or request or order cannot withour more be hearsay. It depends in no way on the veracity or credibility of the out-of-court declarant; it merely relates the fact that the other person made the statement, and makes no assertion with reference to its truth and is not offered for that purpose. Upon the same familiar principle, no hearsay rule is involved in admitting a newspaper in evidence to prove only that a certain article or advertisement appeared therein."*

The oral utterance of Bass inviting the defendants to his apartment does not come within the hearsay exclusion. Rather, it is an oral act which was not an assertion of fact. No credibility of Bass was involved in any sense; his invitation was a fact in and of itself and, therefore, is admissable as have a bearing on whether the defendants forcibly entered the apartment. also see *Richter v. State*, 438 S.W.2d 362, 365 (Tenn. Cr. App. 1968); *Dillard v. State*, 528 S.W.2d 207 (Tenn. Cr. App.

1975).

While we hold the exclusion of the evidence that Bass invited the defendants and Pope to this apartment was error, we are satisfied that this did not affect the result of the trial. Pope was permitted to testify that Bass led them to his apartment because he wanted to talk with the defendants about his wife's legal problems and to drink whiskey. Bass stopped at a store on the way to the apartment and purchased soft drinks to mix with the whiskey. The witness testified that Bass pointed to the door of the apartment and that all four of them entered it together with Bass who was carrying a bottle of whiskey. Pope testified repeatedly that this was Bass's apartment and that Bass had invited them to the apartment. The defendants themselves were permitted to relate the express words of Bass. We are quite satisfied that all of the facts were presented to the jury by Pope although the converation was not related verbatim.

The trial judge would not permit testimony from Pope to the effect that Russell said upon entering the upstairs bedroom, "*He's got a gun.*" This declaration was sustantially contemporaneous with the main fact at a time so near as to preclude the idea of deliveration and fabrication; it was part of the *res gestae* and should have been admitted. *Garrison v. State*, 40 S.W.2d 1009, 1011 (Tenn. 1931); *Ellison v. State*, 549 S.W.2d 691 (Tenn. Cr. App. 1976). However, we are fully satisfied that this error did not affect the results of the trial. Both defendants testified that he made the utterance. The fact that the utterance was made is of only nominal consequence, if any.

We can only discern from the record that after having gone upstairs, Ms Wood screamed, but made no assertion, and the scream motivated the defendants and Pope to follow her. Pope testified that after Wood went upstairs, he heard "*A female* [*Wood*] *make a loud noise.*" When asked to describe the noise, Pope testified,

"It was like a scream." Pope was permitted to testify that Wood screamed. We find no error here.

While we think that the error excluding the previously mentioned evidence as hearsay was mere trial error and not constitutional error requiring the *"the harmless-beyond a reasonable-doubt"* rule as mandated by *Chapman v. California* 87th S.Ct. 824; 386 U.S. 18 (1967), we can say that we are convinced beyond a reasonable doubt that these errors did not affect the results of the trial.

Therefore, the judgements below must be affirmed.

LLOYD TATUM, JUDGE

CONCUR:

MARK A. WALKER, Presiding Judge

JOHN K. BYERS, Judge

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

STATE OF TENNESSEE,
Plaintiff-Appellee,

v. Shelby Criminal No. 48

J.M. RUSSELL and
EUGENE LEAKE,
Defendants-Appellants.

ORDER

Upon consideration of the application for permission to appeal filed by the appelants and the answer of the Appellants and the answer of the Appellee, the briefs of counsel and the entire record, the Court is of the opinion that the application should be denied.

Costs will be borne by the Appellants.

PER CURIAM